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MICHEL KECK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MICHEL KECK, on behalf of herself and
others similarly situated,

Plaintiff,

v.

ALIBABA.COM, INC., et al.,

Defendants.

Case No. 5:17-cv-05672-BLF

**PLAINTIFF'S APPLICATION TO SERVE
FOREIGN DEFENDANTS BY
ELECTRONIC MEANS**

Judge: Hon. Beth Labson Freeman
Trial date: October 4, 2021

1 Plaintiff Michel Keck seeks leave to serve by electronic means numerous Chinese
 2 defendants who operate or formerly operated online storefronts on the AliExpress.com shopping
 3 platform (“Defendant Stores”) (*See* Ex. 1 for a list of the Defendant Stores). Keck—through
 4 discovery from defendant Alibaba.com Hong Kong, Ltd. and through the efforts of an
 5 investigator—has been unable to locate the physical addresses of the Defendant Stores. But
 6 Keck’s successful transmission of test messages to the Defendant Stores demonstrates that
 7 electronic communications are reasonably calculated to provide the Defendant Stores notice of this
 8 action. This Court has already held that Keck may serve by electronic means similarly situated
 9 Chinese defendants who do business on AliExpress.com and whose physical addresses could not
 10 be located. (*See* ECF 74). Just as with the defendants who were the subject of that previous
 11 order, the facts and circumstances presented here justify electronic service on the Defendant Stores
 12 under Rule 4(f)(3).

13 BACKGROUND

14 Keck has asserted copyright infringement claims against Alibaba Group Holding, Ltd. and
 15 several of its subsidiaries (collectively, “Alibaba Defendants”) as well as against various Chinese
 16 merchants who have operated virtual storefronts on the e-commerce platforms AliExpress.com
 17 and Alibaba.com. (*See* ECF 1 ¶¶ 22-96.) One of the Alibaba Defendants, Alibaba.com Hong
 18 Kong, Ltd., admits that it operates Alibaba.com and AliExpress.com. (*See* ECF 152-1 at ¶ 15.)

19 Keck has served all of the Alibaba Defendants with process (ECF 173 at 2, 3), and the
 20 Alibaba Defendants have all entered appearances in this action. As Keck has previously noted,
 21 Keck was able to obtain complete physical addresses for three Chinese merchant defendants who
 22 have operated virtual storefronts on Alibaba.com or AliExpress.com. (ECF 39-2 at ¶¶ 7-9.) Keck
 23 has initiated service on those three defendants through the Chinese Central Authority, consistent
 24 with the Hague Convention. (ECF 173 at 2) *See* Fed. R. Civ. P. 4(f)(1).

25 The Court granted Keck leave under Rule 4(f)(3) to serve an additional 17 Chinese
 26 merchant defendants by electronic means. Keck explained in seeking leave to serve those
 27 defendants by electronic means that an investigator searched various Chinese databases but was
 28 unable to confirm complete physical addresses for those 17 defendants. (*See* ECF 39, “First

1 4(f)(3) Application”) Those defendants, however, maintained active Alibaba.com or
 2 AliExpress.com storefronts, and the investigator confirmed that those defendants could be
 3 contacted through the Alibaba.com and AliExpress.com electronic messaging systems. (ECF 39-
 4 4.) This Court therefore allowed Keck leave to serve those 17 defendants through the
 5 Alibaba.com and AliExpress.com messaging systems. (ECF 74 at 7-8.) None of those 17
 6 defendants appeared in this Court following service (ECF 164-1), and the Clerk entered defaults
 7 against all of them. (ECF 168.)

8 Keck also sought this Court’s permission to serve by electronic means additional Chinese
 9 defendants who operated storefronts on Alibaba.com or AliExpress.com. (*See* ECF 148, “Second
 10 4(f)(3) Application”). This Court in denying the Second 4(f)(3) Application without prejudice
 11 explained that Keck had not attempted to locate physical addresses for the defendants who were
 12 the subject of that application; by contrast, Keck for her First 4(f)(3) Application hired
 13 investigators who were unable to find physical addresses for the defendants. (*See* ECF 170 at 4.)

14 Two days after the Court denied without prejudice Keck’s Second 4(f)(3) Application,
 15 Keck served a discovery request on the Alibaba Defendants that sought the physical addresses for
 16 all the Defendant Stores. (ECF 173 at 2) (Keck had previously requested those defendants’ e-
 17 mail addresses.) Keck explained in the Case Management Statement that for any additional
 18 Chinese merchants that would be served, Keck would “either initiate service under the Hague
 19 Convention or seek this Court’s permission to serve them by alternate means within 21 days of
 20 receiving the Alibaba Defendants’ responses to Ms. Keck’s requests for those Merchant
 21 Defendants’ addresses.” (ECF 173 at 2.)

22 Alibaba.com Hong Kong, Ltd. on June 1, 2018, produced a document in response to
 23 Keck’s discovery requests that provides the Chinese names and e-mail addresses for the Chinese
 24 merchant defendants and lists physical addresses for a few of those defendants. (*See* Ex. 2-A)

25 Keck hired an investigator in Hong Kong to attempt to locate physical addresses for 32
 26 Chinese merchant defendants for whom Alibaba.com Hong Kong, Ltd. was not able to provide
 27 complete physical addresses. (Ex. 3 at ¶4.) That same investigator had previously attempted to
 28 locate the 17 merchants who were the subject of the First 4(f)(3) Application. (*See* ECF 39-4.)

1 The investigator attempted to find addresses for the 32 additional defendant merchants, by
 2 searching both their English and Chinese names in the same six Chinese databases that he used
 3 when searching for the defendants who were the subject of the First 4(f)(3) Application.
 4 (*Compare* Ex. 3 at ¶ 5 with ECF 39-4 at ¶ 5.) The investigator was only able to find physical
 5 addresses for seven of those merchants (Ex. 3 para. 6.) (Those seven merchants are therefore not
 6 included among the Defendant Stores who are the subject of this application.)

7 The investigator sent test messages through the AliExpress.com messaging system to the
 8 27 Defendant Stores who maintained active AliExpress.com storefronts. None of those test
 9 messages were returned as undeliverable, and a majority of the Defendant Stores responded to the
 10 test messages. (Ex. 3 at ¶¶ 7-11.)

11 Four of the Defendant Stores no longer maintain active Alibaba.com or AliExpress.com
 12 storefronts. (Ex. 3 at ¶ 12.) A paralegal sent test e-mails to the e-mail addresses that Alibaba.com
 13 Hong Kong, Ltd. provided for those four Defendant Stores. None of those e-mails were returned
 14 as undeliverable, and three of the Defendant Stores responded to the test e-mails. (Ex. 4 at ¶¶ 2-4.)

15 ARGUMENT

16 Keck has been unable to locate physical addresses for the 25 Defendant Stores, believed to
 17 be in China, despite seeking that information from the Alibaba Defendants in discovery and hiring
 18 an investigator in Hong Kong to search for those addresses. The Defendant Stores, however, have
 19 conducted business online—in fact, Keck’s claims arise out of their online activity. And Keck has
 20 established that those Defendant Stores can be contacted through electronic means. Keck
 21 therefore requests leave under Rule 4(f)(3) to serve those Defendant Stores by electronic means.

22 This Court has previously explained that “Rule 4(f)(3) allows for an alternate means of
 23 service as long as it is directed by a court and not prohibited by international agreement.” (ECF
 24 74 at 3.) A method of service must satisfy due process, but “[s]ervice by email can satisfy due
 25 process when a foreign defendant structured its business on the internet using email as the
 26 preferred contact method and did not list an easily discoverable street address.” ECF 74 at 3
 27 (citing *Rio Props., Inc. v. Rio Int’l. Interlink*, 284 F.3d 1007, 1017-18 (9th Cir. 2002)). This Court
 28 has already held that Chinese merchants operating storefronts on Alibaba.com or AliExpress.com

1 may be served through the Alibaba.com or AliExpress.com messaging system when those
 2 merchants' physical addresses could not be located. (ECF 74.) As Keck demonstrates below, that
 3 holding applies here.

4 **A. No international agreement prohibits service by electronic means.**

5 The Court previously held in this case that no international agreement prohibits service on
 6 Chinese defendants by electronic means. *See* ECF 74 at 5 (“[T]he Court concludes that the Hague
 7 Convention, to the extent applicable under the circumstances, does not prohibit service through
 8 electronic means.”). *See also Microsoft Corp. v. Goldah.com Network Tech. Co.*, No. 17-CV-
 9 02896, 2017 WL 4536417, at *4 (N.D. Cal. Oct. 11, 2017) (“China’s objection to Article 10 [of
 10 the Hague Convention] does not prohibit the email service the Court ordered in the instant case.”).

11 **B. The Defendant Stores’ physical addresses could not be located despite Keck’s**
 12 **efforts.**

13 Keck has been unable to locate physical addresses for the Defendant Stores. This Court
 14 previously allowed Keck to serve AliExpress.com merchants by electronic means when an
 15 investigator was unable to locate physical addresses for those merchants. Keck hired the Hong
 16 Kong investigator who searched for physical addresses for the merchants who were the subject of
 17 Keck’s First 4(f)(3) Application. That investigator searched the same databases that he used when
 18 searching for the merchants who were the subject of First 4(f)(3) Application, but, despite those
 19 efforts, he was unable to find physical addresses for the Defendant Stores. (*See* Ex. 3.) Keck filed
 20 her First 4(f)(3) Application before the Alibaba Defendants had appeared, so, unlike with her First
 21 4(f)(3) Application, Keck was able to seek discovery of the physical addresses for the Defendant
 22 Stores who are the subject of the present application. But Alibaba.com Hong Kong, Ltd. was not
 23 able to provide complete physical addresses for the Defendant Stores.

24 **C. Service through the AliExpress.com messaging system or e-mail is reasonably**
 25 **calculated to provide notice to the Defendant Stores.**

26 Service through the AliExpress.com messaging system is reasonably calculated to provide
 27 notice of this action to the 21 Defendant Stores who still maintain AliExpress.com storefronts, and
 28

1 service through e-mail is reasonably calculated to provide notice of this action to the 4 Defendant
2 Stores who no longer maintain AliExpress.com or Alibaba.com storefronts.

3 This Court previously explained that “service through the Alibaba.com and
4 AliExpress.com online messaging system is reasonably calculated to provide notice to Defendant
5 Stores who operate virtual storefronts regarding the pendency of this action. In fact, service
6 through the messaging system is the method most likely to apprise Defendant Stores of the
7 action.” ECF 74 at 5. The Defendant Stores who are the subject of this application and who
8 continue to operate AliExpress.com storefronts are in the same situation as the defendants who
9 were subject to Keck’s First 4(f)(3) Application: the Defendant Stores operate storefronts on
10 AliExpress.com, their physical addresses could not be located after diligent investigation, and test
11 messages submitted through the AliExpress.com messaging system did not “bounce back” and, in
12 many instances, were answered. *See* ECF 74 at 6 (“Because Defendant Stores have responded to
13 online messages, service through the online messaging system is reasonably calculated to give
14 notice to Defendant Stores and afford them an opportunity to present objections.”); *see also* *Toyo*
15 *Tire & Rubber Co. v. CIA Wheel Grp.*, No. 15-0246, 2016 WL 1251008, at *3 (C.D. Cal. March
16 25, 2016) (“Many cases have found service of process by email to be reasonably calculated to
17 provide actual notice when the test email is not returned as undeliverable or bounced back.”) (cited
18 at ECF 74 at 6).

19 Similarly, e-mail is the most effective method of providing notice of this action to the
20 Defendant Stores who no longer operate AliExpress.com storefronts. As noted above, test e-mails
21 were recently sent to all four of those Defendant Stores who no longer operate AliExpress.com
22 storefronts. None of those messages “bounced back” and three of those messages were answered.
23 (*See* Ex. 4.) Service by e-mail is particularly appropriate here because the Defendant Stores
24 structured and operated online businesses and would therefore be accustomed to communicating
25 by electronic means. And the evidence indeed shows for these Defendant Stores that e-mail is the
26 preferred means of communication—Alibaba.com Hong Kong, Ltd. had e-mail addresses but not
27 complete physical addresses for those Defendant Stores, and those Defendant Stores do not list
28 their physical addresses listed in the Chinese databases that Keck’s investigator searched. *See Rio*

1 *Props., Inc.*, 284 F.3d at 1018 (allowing e-mail service when the defendant “structured its business
 2 such that it could be contacted *only* via its email address. [The defendant] listed no easily
 3 discoverable street address in the United States or Costa Rica. Rather, on its website and print
 4 media, [the defendant] designated its email address as its preferred contact information.”); *see also*
 5 ECF 74 at 5 (“Since *Rio Properties*, district courts have repeatedly recognized that electronic mail
 6 service can be the most effective way to provide notice where defendants conduct commercial
 7 internet activities and their physical addresses are unidentifiable.”) (collecting cases).

8 Keck has been diligent in seeking the physical addresses of the Defendant Stores. Two
 9 days after this Court denied without prejudice her Second 4(f)(3) Application, Keck served
 10 discovery on the Alibaba Defendants that sought physical addresses for the Defendant Stores.
 11 Alibaba.com Hong Kong, Ltd. responded to Keck’s discovery request on June 1, 2018. *See* ECF
 12 173 at 2 (stating that Keck would file any additional application under Rule 4(f)(3) within 21 days
 13 of the Alibaba Defendants responding to Keck’s requests for merchant defendants’ physical
 14 addresses.) Since the Defendant Stores are in China, Rule 4(m)’s time limit for service is
 15 inapplicable. *See* Fed. R. Civ. P. 4(m) (“subdivision (m) does not apply to service in a foreign
 16 country . . .”).

17 **D. Subsequent pleadings may be served by electronic means.**

18 Keck further requests that she be permitted to serve subsequent motions and pleadings on
 19 the Defendant Stores by electronic means. Specifically, for pleadings that Keck may be required
 20 to serve on the Defendant Stores, Keck seeks permission to send the Defendant Stores a link
 21 through e-mail or the AliExpress.com messaging system to a secure website where the motions
 22 and pleadings may be accessed, unless counsel for the Defendant Stores enter an appearance. This
 23 Court previously allowed Keck to serve subsequent motions and pleadings on other Chinese
 24 merchant defendants through electronic means. (*See* ECF 74 at 6-7.)

25 **E. Note regarding service of this Application**

26 A copy of this Application will be automatically served through CM/ECF on the
 27 defendants who have appeared in this action. None of the Defendant Stores who are subject to this
 28 application have appeared in this action, but Keck has transmitted a copy of this Application, with

all supporting exhibits, to the Defendant Stores through the AliExpress.com messaging system or through e-mail. Motions to serve defendants under Rule 4(f)(3) must often be filed ex parte. *See, e.g.,* ECF 74 at 1-2 (noting that Keck's First 4(f)(3) Application was filed ex parte); *Tecnologias Avanzadas RD, SRL v. Riegler*, 2017 WL 2772301, at *1 (N.D. Cal. June 1, 2017). Civil Local Rule 7-10 permits an ex parte application as long as the application is permitted by another statute or rule. California Rule of Court Rule 3.1204(b) permits an application for an ex parte order to proceed without notice upon a showing that the applicant in good faith attempted to inform the opposing party but has been unable to do so.

CONCLUSION

Keck, through discovery and the efforts of an investigator, has been unable to locate physical addresses for the Defendant Stores listed in Exhibit 1, but those Defendant Stores can be contacted by e-mail or through the AliExpress.com messaging system. The facts and circumstances of this case thus justify service by electronic means. Therefore, Keck respectfully requests leave to serve the Complaint, summonses, and the documents required under the local rules to be served with the Complaint on the Defendant Stores listed in Exhibit 1 through the AliExpress.com messaging system or through e-mail. Keck further requests leave to serve through the AliExpress.com messaging system or through e-mail any other papers she is required under the Federal Rules of Civil Procedure to serve on them.

Dated: June 22, 2018

By: /s/ Jason Earley

Jason Earley

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One of the attorneys for Plaintiff Michel Keck